



**MEMORANDUM**

To: Dave Yost, Ohio Attorney General

cc: Brenda Rinehart, First Assistant Attorney General

From: Jonathan Blanton, Deputy Attorney General for Major Litigation

Date: December 2, 2019

Re: Constitutional Amendment to Establish the “Ohio State and Local Government Opioid Crisis Recovery Foundation”

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**Executive Summary:**

The opioid crisis has devastated Ohio. It will take years, if not decades, and hundreds of millions of dollars to repair the damage to our communities. The Ohio Attorney General (“the State”) has sued a number of companies that manufactured or distributed prescription opioids. Roughly seventy Ohio counties, and numerous cities, (“the Subdivisions”) have taken similar action. All seek the same thing – resources to abate the epidemic of addiction and death that continues to plague Ohio.

The State and Subdivisions have been discussing an “All Ohio” settlement that would resolve the claims of the State and Subdivisions in a coordinated manner. A defining principle of any proposed “All Ohio” settlement is the establishment of a fund that is fully dedicated to *future* abatement activities throughout the State of Ohio.

This is a particularly thorny problem. Everyone in Ohio remembers the settlement with Big Tobacco, which was monetized and diverted to other uses. With the potential for a large settlement or verdict in the current opioid litigation, questions are being raised about whether funds received in future years may be similarly diverted.

These are no ordinary lawsuits, in kind or size. Any settlement is likely to be paid out over many years, and likely to be larger than others by several orders of magnitude. The opioid epidemic is also unusual, and will take years of concerted effort to clean up.

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In short, Ohio is unlikely to have access to this level of financial resources again. This is literally a once-in-a-lifetime, do-or-die moment.

There are a variety of tools available – a statute, a consent decree from a state or federal court and an executive order have all been suggested -- but none of these provide a guarantee of stability into the future. Each new General Assembly has the ability to change an existing statute. No one is eager to submit the state's efforts to a federal court's jurisdiction through a consent decree. State court jurisdiction is no more appealing, as state judges can, and often do, change with each election – and they are subject to statutory limitations on jurisdiction, to boot. Finally, an Executive Order can be changed with the stroke of a pen.

The best solution – really the only solution - is to invoke the power of the people through an amendment to the Ohio Constitution to establish a Recovery Foundation.

The most robust example of Constitutional preservation of settlement proceeds comes from the State of Oklahoma and its Tobacco Settlement Endowment Trust Fund (the “TSET”). OKCONST O.S. § Article 10 section 40 (OSCN 2019). What is special about Oklahoma's trust is that portions of the fund's principal must be preserved from year to year, thus insuring its own survival.

Established by popular vote in 2000, and operationalized by statutes adopted by the Oklahoma legislature subsequent to its passage, TSET serves as Oklahoma's repository for its share of settlement proceeds from the National Tobacco Settlement. Monetary funds placed in the trust are invested pursuant to specific statutory restrictions. TSET, including interest, dividends and realized capital gains, can then be expended for certain Constitutionally enumerated purposes, while the principal remains untouched. OKCONST O.S. § Article 10 section 40(E).

Given the extraordinary and long-term cost of addressing the opioid crisis and resulting substance abuse crisis, an Ohio Recovery Foundation could no doubt expend some, or all, of the principal payments each year. However, with proper management, a portion of each year's payment could be retained and invested to ensure that the Foundation's mission continues beyond the term of any payment agreements.

### **Process for Placing an Amendment on the Ballot**

Article XVI, Section I of the Ohio Constitution permits either chamber of the General Assembly to propose a constitutional amendment. In order to be placed on the ballot, the amendment must be agreed upon by three-fifths of the members of both the House of Representatives and the Senate and filed with the Secretary of State at least ninety days before the date of the election at which the amendment is to appear on the ballot.

Article XVI, Section I of the Ohio Constitution states that the General Assembly may propose an amendment to appear on either a special or a general election ballot. It does not specifically state that a proposed amendment may appear on a primary ballot. In fact, the term “special election” means any election *other* than a general or primary election. R.C. 3501.01(D). However, the Ohio Supreme Court has held that the General Assembly may pass a resolution proposing a constitutional amendment and setting the special election on the question to be held on a certain day. *State ex rel. Foreman v. Brown*, 10 Ohio St.2d 139 (1967). And, that day can be the day of a general or a primary election. *Id.*

If the General Assembly chooses to propose a constitutional amendment that would enshrine—and protect—opioid settlement money, the goal would be for that amendment to appear on the March 2020 primary ballot. That would be possible *only if* the General Assembly passes a complimentary resolution setting a special election for March 17, 2020.

The greatest challenge to a constitutional amendment is time. In order to appear on the March 17, 2020 ballot, a resolution proposing the Amendment must be introduced, approved by three-fifths of both houses of the legislature and filed with the Secretary of State *on or before December 18, 2019*. If that cannot be done, then the amendment must either be subject to a special election or be put off until the general election in November.

### **Proposed Amendment Language**

The language below seeks to capture and formalize concepts laid out in meetings with Ohio’s subdivisions and representatives of Governor DeWine’s RecoveryOhio Initiative. RecoveryOhio’s multidisciplinary and multiagency makeup, coupled with the

broad and diverse expertise found on the RecoveryOhio Advisory Council, provides a unique opportunity for State government to work hand-in-hand with treatment providers, academics, caregivers and local government officials to create and implement an “All Ohio” plan for addressing the real and pressing needs Ohio faces as it lives into the legacy of pervasive opioid addiction and abuse.

There are several key aspects to any “All Ohio” plan:

1. Because the opioid crisis is so pervasive, an “All Ohio” plan must address both Ohio’s short and long-term needs;
2. Ohio’s political subdivisions must be empowered partners with the State in establishing and administering an “All Ohio” plan;
3. The mechanism through which an “All Ohio” settlement is established and operated must be transparent, accountable and robust;
4. Ohio’s communities have critical needs that must be addressed right now through direct cash payments;
5. Ohio’s communities have critical needs that must be addressed through state and regional programs and services; and,
6. State agencies and officeholders must play a role in helping Ohio recover.

The proposed Amendment incorporates those concepts by:

1. Ensuring that settlement dollars are spent on abatement, not pet projects;
2. Creating a Board of Directors consisting of representatives of the State, cities and counties, the legislature and subject matter experts;
3. Establishing nineteen Abatement Regions, eight Metropolitan and 11 non-Metropolitan, to highlight the varied needs of Ohio’s cities and counties; and,
4. Securing a source of revenue to fund Ohio’s abatement needs into the future.

The proposed Amendment cannot stand on its own. Additional statutory provisions will be required to put these concepts into operation. Key among them will be defining the boundaries of Ohio’s Opioid Abatement Regions, the process by which representatives of each Region will be selected for service on the Foundation’s Board of

Directors, the rules by which the Board of Directors and Board of Investors will be governed and establishing a budget for the Foundation Fund's operation.

**Article \_\_\_\_ Section \_\_\_\_: The Ohio State and Local Government Opioid Crisis Recovery Foundation**

- A. There is hereby created in the Executive Branch the "Ohio State and Local Government Opioid Crisis Recovery Foundation" ("the Foundation"), a nonprofit corporation. The purpose of the Foundation is to formulate, prepare and execute an evidence-based plan to remediate and abate the ongoing harm arising from "Opioid Use Disorder" and to promote Ohio's recovery from the opioid crisis by receiving and distributing to local entities, directly or through existing state agencies, a portion of the proceeds of any court settlement or judgment received in connection with any opioid litigation in which the State of Ohio or any of its agencies, officers or elected officials is a party. The Governor shall designate the state agency, program or individual (the "Principal Executive") responsible for overseeing and supporting the operation and management of the Foundation, subject to the advice and consent of the Senate. The Principal Executive shall be responsible for providing all staffing and material support necessary for the management of the Foundation. The General Assembly shall appropriate to the Principal Executive funds sufficient to provide administrative support and services required by the Foundation. Such funds shall not be taken from or credited against any incoming settlement or judgment proceeds.
- B. To better facilitate the work of the Foundation, the State of Ohio shall be partitioned into 8 Metropolitan Opioid Abatement Regions and 11 non-Metropolitan Opioid Abatement Regions. The Metropolitan Opioid Abatement Regions shall consist of: Region 1: Franklin County; Region 2: Hamilton County; Region 3: Cuyahoga County; Region 4: Lucas County; Region 5: Summit County; Region 6: Stark County; Region 7: The Counties of Trumbull and Mahoning; and, Region 8: Montgomery County. Ohio's remaining counties shall be divided into 11 multi-county non-Metropolitan Abatement Regions based upon geographic proximity, considering similarities in need and impact and with an eye toward equalizing population between the regions.

- C. There is hereby created in the state treasury a trust fund to be known as the "Ohio Statewide Recovery Trust Fund" (the "Statewide Recovery Fund"). The Statewide Recovery Fund shall consist of these settlement or judgment proceeds, any other money that may be appropriated or otherwise directed to the Fund by the Legislature and any grants, gifts or donations made to the fund.
- D. A voluntary donor or grantor may require any gift, grant or donation be retained for investment in accordance with part I of this section. The principal of grants, gifts and donations so limited shall not be subject to direct distribution to any program, officer or department of the state or to any political subdivision.
- E. All moneys in the Statewide Recovery Fund shall be for the sole use of and distribution by the Foundation for the purpose of promoting and maximizing Ohio's opioid abatement and recovery strategies as described in part N of this section.
- F. Not less than\_\_\_\_% of proceeds of any court settlement or judgment received by the State of Ohio on or after March 17, 2020, in connection with any opioid litigation in which the State of Ohio, or any of its agencies, officers, or elected officials is a party, with the exception of funds dedicated to the payment of attorneys' fees and litigation costs, shall be deposited into the Statewide Recovery Fund.
- G. \_\_\_\_% of any payment received through settlement proceeds or judgment from any action against shall be retained in the Statewide Recovery Fund for investment as described in subsection I of this section. The balance of any moneys received by the Statewide Recovery Fund, along with any earnings from the trust fund, including but not limited to interest, dividends, and realized capital gains from investments of the trust fund shall be expended as provided in subsection N herein.
- H. There is hereby created the Board of Investors of the Ohio State and Local Government Recovery Foundation. The Board of Investors shall have the duty to invest designated money retained in the Statewide Recovery Fund, subject to restrictions and limitations provided for by law and in accordance with laws applicable to the investments in state retirement funds.

The Board of Investors shall consist of five (5) members as follows:

1. The State Treasurer who shall be the chair;
2. An appointee of the Governor;
3. An appointee of the Speaker of the House of Representatives;
4. An appointee of the President of the Senate; and
5. An appointee of the State Auditor.

The initial appointees shall serve staggered terms of office as provided for by law. Thereafter, appointees shall serve four-year terms of office. No more than two appointees shall be appointed from any single congressional district. All appointed members shall have demonstrated expertise in public or private investment funds management.

I. There is hereby created the Board of Directors of the Ohio State and Local Government Recovery Foundation. The Board of Directors shall consist of the twelve (12) members, selected as follows:

1. One representative of the Governor;
2. One representative of Attorney General;
3. One representative nominated by the President of the Ohio Senate;
4. One representative nominated by the Ohio Senate Minority Leader;
5. One representative nominated by the Speaker of the Ohio House of Representatives;
6. Two representatives nominated by the Ohio House Minority Leader;
7. Two representatives from among of the 11 non-Metropolitan Opioid Abatement Regions;
8. One representative selected from among the 8 Metropolitan Opioid Abatement Regions; and,
9. Two persons chosen by the Governor with consent from the Attorney General representing a cross section of the fields of treatment of substance use disorders, social services, addiction medicine and impacted families.

- J. The Board of Directors shall meet at least one time each calendar year.
- K. The initial appointed members shall serve staggered terms of office as provided for by law. Thereafter, the appointed members of the Board of Directors shall serve \_\_\_\_-year terms of office.
- L. Each fiscal year, the Board of Directors may expend the amount of earnings which actually accrued to the trust fund during the preceding fiscal year along with \_\_\_\_% of incoming settlement or judgment proceeds, along with the principal of any grant, donation or gift not restricted pursuant to part D herein, received during the preceding fiscal year. Any amount not so expended shall remain in the trust fund.
- M. All distributions and funding support provided out of the Statewide Recovery Fund shall be voted upon and approved by a majority of the Board present at each meeting.
- N. Foundation funds shall be allocated to provide monetary relief and services equitably among Ohio's Abatement Regions. Decisions shall be based on each Region's need for services that provide a broad range of assistance and referrals to the community served, including treatment, intervention and prevention of Opioid Use Disorder and to support law enforcement efforts relating to the opioid epidemic. In determining a local government's need for Foundation Funds, the Foundation shall not consider other disbursements of State funds to the local government under any other provision of Ohio law.
- O. No later than January 1, 2021, and on or before January 1 of each year thereafter, the Board of Directors of the Foundation shall file a financial report with the auditor of state pursuant to R.C. 117.38.
- P. At the general election to be held in the year two thousand and forty, and in each twentieth year thereafter, the question: "Shall the Ohio State and Local Government Opioid Crisis Recovery Foundation continue for an additional term of twenty years[,]" shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the continuation, decide in favor of continuing the Foundation, it shall continue on its original terms. However, in



case a majority of the electors, voting for and against the continuation, decide against continuing the Foundation, the Foundation shall be dissolved not later than ten (10) months after the date of that election and its assets shall be distributed by the legislature in support of statewide substance abuse abatement efforts.

- Q. The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under or seeking to enforce the provisions of this Amendment.
- R. The Legislature may enact laws to further implement the provisions of this section.